IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 27TH JULY 2007 / 5TH SRAVANA 1929

SA.No. 381 of 1993()

AS.142/1989 of PRL. SUBORDINATE COURT,THALASSERY
OS.17/1988 of MUNSIFF COURT, THALASSERY
.....

DEFENDANTS/ APPELLANTS/APPELLANTS
----

1. **NALLAKANDI KOTTIYATH SURESHAN S/O.RAJALAKSHMI, RESIDING AT ANJARA KANDI AMSOM, MAMBA DESOM.**

2. **T.K.PRIYADATTAN, S/O.KUNHIRAMAN, PREVISH PROFESSOR, GOVERNMENT POLYTECHNIC COLLEGE, NEAR NEW BUS STAND, CANNANORE.**

BY ADV. SRI.A.K.JOSE
SRI.V.V.ASOKAN
SRI.JOSE JOSEPH

PLAINTIFFS/ RESPONDENTS/ RESPONDENTS
----

1. **NALLAKANDI KOTTIYATH NANDINI, D/O.KU HIMANI, ANJARAKKANDI, AMSOM, MAMBA DESOM.**

2. **N.ROHINI, D/O. KUNHIMANI, ANJARAKANDI AMSOM MAMBA DESOM.**

3. **N.RAJA, D/O.ROHINI, ANJARAKANDI, AMSOM, MAMBA DESOM.**

BY ADV. SRI.M.P.ASOK KUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 381 OF 1993

Dated 27th July 2007

J U D G M E N T

Defendants in O.S.17 of 1988 on the file of Munsiff court, Thalassery are appellants. Respondents are plaintiffs. Respondents instituted the suit seeking a decree for permanent prohibitory injunction contending that appellants and respondents are members of Nallakkandy tarward and as per Ext.A1 partition deed properties were divided and A schedule property therein was allotted to the share of Chemmarathi and others and B schedule to the share of Devaki and others and respondents are legal heirs of Chemmarathi and appellants are legal heirs of Devaki and respondents are in possession of plaint schedule property and appellants have no manner of right or possession of the same and they attempted to trespass into the plaint schedule property and therefore they are to be restrained by a permanent prohibitory injunction from trespassing into the plaint schedule property. Appellants resisted the suit contending that

respondents are not in possession of the property. It was contended that though properties were divided under Ext.A1 partition deed and A schedule properties therein were allotted to the share of Chemmarathi. Plaint schedule property was entrusted by Balan, son of Chemmarathi in favour of Anandan, S/o.Devaki and since then Anandan has been in possession of the property and appellants purchased the jenm right from Land Tribunal and respondents are not in possession of the property and are therefore not entitled to the decree sought for. It was also contended that subsequently respondents had divided the property in their possession as per a registered partition deed and plaint schedule property was not divided thereunder and it shows that respondents were not in possession of the plaint schedule property.

2. Learned Munsiff on the evidence of Pws.1 to 3, DW1, Exts. A1 to A4 and B1 to B17 granted a decree in favour of respondents holding that appellants failed to establish the oral entrustment set up and evidence of Pws.1 to 3 and Exts.A1 to A4 establish that respondents are in possession of the plaint schedule property. Appellants challenged the decree and judgment before Sub court, Thalassery in A.S.142 of 1989. Learned Sub Judge

on re-appreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in appeal.

3. Appeal was admitted formulating the following substantial questions of law.

> 1) Whether courts below were justified in ignoring Ext.B1 purchase certificate obtained by appellants which establish that respondents are not in possession of plaint schedule property.
>
> 2) Whether courts below were justified in granting a decree for injunction ignoring the admission made by appellants in Ext.B15 partition deed whereunder properties in their possession obtained under Ext.A1 partition deed were divided.

4. Learned counsel appearing for appellants and respondents were heard.

5. Fact that plaint schedule property originally formed part of the properties belonging to the family of appellants and respondents is admitted. Family properties were divided under Ext.A1 partition in 1952. A schedule properties were allotted to Chemmarathi under whom respondents claim right. B schedule properties were

allotted to Devaki, under whom appellants claim right. Plaint schedule property is admittedly part of the properties allotted to Chemmarathi and others under A schedule. Case of appellants was that plaint schedule property was entrusted by Balan, brother of respondents to Anandan, son of Devaki and since then Anandan and thereafter they have been in possession of the property. Under Ext.B16 appellant purchased jenm right of the property from Land Tribunal. Learned Munsiff and learned Sub Judge considered the evidence of appellants to prove tenancy claimed by them and held that evidence is insufficient to prove that there was an oral entrustment in favour of Anandan as claimed by them and upheld the case of respondents and granted a decree for injunction. As rightly pointed out by learned counsel appearing for appellants in a suit for injunction plaintiff can succeed only on establishing his possession of the suit property. Failure of the defendant to prove the tenancy is not a valid ground to grant a decree for injunction. So also the weakness of the defence case will not enable the plaintiff to get the decree. Hence failure of the appellants to prove the oral entrustment by Balan in favour of plaintiff Anandan will not enable respondents

to get a decree without establishing that they are in possession of the plaint schedule property. Question is whether there is evidence to prove that they are in possession of the property.

6. Respondents are claiming right and possession under Ext.A1. Fact that under Ext.A1 properties are allotted to the share of Chemmarathi and respondents inherited to the said properties were not disputed. Question is whether they are in possession of the plaint schedule property and whether they established the possession. As rightly pointed out by learned counsel appearing for appellants, Ext.B15 is a very important material to decide the factum of possession. Under Ext.B15 partition deed properties allotted to the tavazhy of Chemmarathi were divided in 1976. Under schedule A of Ext.A1 partition deed several items of properties were allotted to them. Ext.B15 establishes only those properties which are in their direct possession were divided thereunder. It was admitted by PW1, who was examined on behalf of respondents, that under Ext.B15 partition deed properties divided were those properties which were then in the direct possession of the executants. Therefore it is clear that though

under schedule A, family of respondents obtained several items of properties, only those properties which were in their direct possession then were divided. Specific recital in Ext.B15 is to the effect that properties divided thereunder are properties in their possession and those properties not included are in the possession of others. If so, when plaint schedule property was not included, it could only be for the reason that they were not in possession of the property. Added to this, PW1 also admitted that properties which are available in their direct possession were divided under Ext.B15. Therefore Ext.B15 establishes that when the properties obtained by them under Ext.A1 were divided in 1976, plaint schedule property was not available in their possession, as otherwise it would have been divided along with other properties in Ext.B15. In the ordinary course, when family obtained several items of properties in a partition and some of the properties were divided, it may not indicate that properties divided are the only properties in their possession. But when Ext.B15 contains a specific recital to the effect that properties in the possession of the family are divided thereunder and the other properties not included are in the possession of

others it is definite that properties not included in Ext.B15 and divided thereunder, are not in the possession of family and instead are in the possession of others. If that be so, Ext.B15 is sufficient to hold that respondents were not in possession of the property even in 1976, when other properties were divided.

7. PW1 has a case that after Ext.A1 plaint schedule property has been in their possession and basic tax was being paid for the said property and rent was also being paid to landlord and all the receipts evidencing payment were in their possession. But none of the basic tax receipts or rent receipts were produced except Ext.A2 basic tax receipt obtained on the eve of the suit and Ext.A3 obtained subsequent to the filing of the suit. Ext.A2 was obtained immediately prior to institution of the suit. Apart from Exts.A2 and A3 the other documents produced are Exts.A1 and A4. Ext.B15 establish that appellants obtained purchase certificate also. Ext.A4 is the receipt obtained for payment of the amount due to Anjarakkandy Farmer's Service Co-op. Bank Limited. It does not show that it is in respect of the plaint schedule property. Other evidence relied on by the courts below is the evidence of Pws.2 and 3. In the light of

Ext.B15 and failure of respondents to produce tax receipts and rent receipts, courts below should not have relied on the oral evidence of Pws.2 and 3 to hold that respondents are in possession of the property. More over PW1 is the first plaintiff and PW2 is a neighbour who admitted that he was giving evidence as asked by the counsel. In the light of the evidence on record, a decree cannot be granted basing on the oral evidence of Pws.1 and 2. On the other hand, when Ext.B15 establish that respondents were not in possession of the plaint schedule property, courts below should not have granted a decree for injunction. Therefore, even though concurrent decree was granted by courts below, in view of the unimpeachable evidence available under Ext.B15 and failure of respondents to adduce satisfactory evidence to establish their possession the decree for permanent prohibitory injunction granted by courts below are unsustainable.

Second appeal is allowed. Decree and judgment passed by learned Munsiff and confirmed by learned Sub Judge are set aside. Suit is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

==========

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.381 OF 1993

27th JULY 2007

==========